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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, appellant, *v.* TOMMY PAYNE. | No. 240.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In October, 1920, Tommy Payne, a Quileute Indian, instituted suit in the United States District Court for the western district of Washington to establish and have judicially declared his right to an allotment of a tract of 80 acres within the Quinaielt Indian Reservation in the State of Washington.

Authority for such a suit is derived from the Act of August 15, 1894, c. 290, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760, which provides:

> That all persons who are in whole or in part of Indian blood or descent who are entitled to

> an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, . . .

His bill of complaint alleged that he is a full-blood Indian of the Quileute Tribe, and has since birth resided upon the *Quileute* Reservation; that under the treaty entered into between the United States and the Quileute and other bands of Indians, and under the "allotting acts of the United States" he is entitled to an allotment of at least 80 acres of land upon the *Quinaielt* Reservation; that about nine

years previously he had selected a tract of 80 acres on that reservation as an allotment but the defendant, the United States, its officers and agents, have neglected and refused to allot the land to him and have excluded him from it. (R. 1–4.)

To this bill of complaint the United States made answer denying the allegations and setting up affirmatively (Par. II, R. 6) that the land "is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes."

To this affirmative part of the answer plaintiff demurred on the ground that it did not constitute a defense. (R. 7, 8.) The demurrer was sustained as to this defense, but "on account of the broad denials of the answer, the demurrer to the answer as a whole is overruled." (R. 14; opinion R. 8 *et seq.*)

The case was tried to the court, which made findings of fact and conclusions of law. (R. 19–23.) The facts found were substantially those set forth in the bill of complaint. The court entered a decree declaring Payne entitled to the lands selected by him, and commanding the United States to issue a certificate of allotment to him for this land and to refrain from asserting or claiming that he was not entitled thereto, with full right to use, occupy and improve the same. (R. 17–19.) Memorandum opinion on merits, R. 15–17.

An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the decree. (R. 60.) Opinion (R. 58–60), 284 Fed. 827. The further appeal of the United States brings the case to this court.

ASSIGNMENT OF ERRORS.

The assignment of errors (R. 62, 63) challenges the correctness of the judgment of the Circuit Court of Appeals in the following particulars:

1. In affirming the action of the District Court in sustaining the demurrer to that part of the answer which asserted that the land involved was not agricultural or grazing but heavily timbered.

2. In affirming the District Court's finding that the land selected by Payne was subject to allotment and that the officers and agents of the United States have wrongfully neglected and refused to allow application for allotment.

3. In sustaining the decree of the District Court which adjudged Payne entitled to have the land allotted to him, to occupy and enjoy the same, and which enjoined the defendant from interfering with Payne's possession thereof.

Under this assignment we present these propositions:

1. The land selected was not subject to allotment.

2. The discretion vested in the President by the applicable law was not exhausted by the survey of the lands within the reservation.

3. The interests of the Quileute Tribe as a whole are not to be subordinated to the interest or claim of an individual member.

ARGUMENT.

I.

The land selected was not subject to allotment.

This case turns upon the question whether the land sought to be acquired by Payne was subject to allotment. Corollary to that is the question of the extent of the Secretary's power and discretion in respect to allotting lands to Indians. There is no dispute as to Payne's status as an Indian or as to his right to an allotment of such lands as are subject to allotment under the applicable laws.

In the consideration of the case attention must be given to the treaty with the Quileutes and Quinaielts and to the general allotment act of February 8, 1887.

By Article I of the treaty of July 1, 1855, 12 Stat. 971, those two tribes ceded to the United States all right in the country then occupied by them.

By Article II the United States agreed to reserve for the use and occupation of the tribes a tract or tracts sufficient for their wants within the Territory of Washington.

Article VI provided that the President might thereafter in his discretion remove these Indians from said reservation or reservations to such other suitable place within the Territory as he deemed fit, on remunerating them for their improvements, or he might consolidate them with other friendly tribes. It further provided:

> And he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

The sixth article of the treaty with the Omahas, so far as is material, is as follows (10 Stat. 1043, 1044):

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members.

Section 1 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, as amended by the Act of February 28, 1891, c. 383, 26 Stat. 794, and the Act of June 25, 1910, c. 431, 36 Stat. 859, 860, reads:

> That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof *to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes* by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. . . . (Italics supplied.)

It will be observed that Article VI of the treaty with the Quileutes and Quinaielts in authorizing allotments does not specify the character of the land which may be taken. Neither does Article VI of the treaty with the Omahas, which apparently was referred to in the other treaty mainly to give specification as to the areas to be allotted and as to the way title was to be acquired.

The General Allotment Act is definite in prescribing the kind and character of land which may be allotted. It is *agricultural* or *grazing*.

The question is thus narrowed to a determination of whether the land sought to be acquired comes within the scope of the term agricultural or grazing as used in the allotment act.

Upon this point the evidence adduced is that this land lies along the Raft River; about 30 acres imme-

diately on the river is bottom land with clay soil, 50 acres back of that is heavily timbered; the timber is valued at $3,900; the land without the timber at $400.

There is little, if any, dispute as to the facts. At any rate both courts below proceeded upon the theory that the land was more valuable for the timber than for agriculture or grazing. This is clear from the opinion of the District Court (R. 13) where, speaking of the authority given the President under the General Allotment act, *supra*, it was said:

> No right is given . . . to refuse an allotment of selected, surveyed land because the lands are more valuable for timber than agriculture or grazing.

And the opinion of the Circuit Court of Appeals (R. 59) where this statement occurs:

> The question before us is whether, under the cited act of Congress of 1887, the land Payne selected should be excluded from allotment because it is in part heavily timbered and until cleared is doubtless more valuable for timber than for agriculture or grazing.

It is difficult to determine exactly the basis upon which the courts below rested their judgments, whether upon a construction of the treaty or upon an interpretation of the General Allotment Act, or upon both.

The District Court, in sustaining the demurrer to that part of the answer setting up that the land was not subject to allotment because timbered, based

its action entirely upon a construction of the allotment act. Opinion, R. 12, 13. However, its memorandum decision on the merits (R. 15, 17) is wholly devoted to a discussion of equitable considerations arising out of the terms of the treaty and which the court thought justified a judgment for the allotment of the land to Payne.

The Circuit Court of Appeals said that it did not regard the allotment act as so limiting the authority of the President that he might not order allotments of lands included in the reservation (R. 59). The opinion indicates that timbered land might be allotted, and that is the apparent basis of the judgment. However, it is clear that the judgments of the courts below were not based upon a finding that the land was agricultural or grazing.

If the conclusion was based upon a construction of the General Allotment Act, we assert that it totally ignores the plain language of that act, which provides that allotments may be made of land which in the opinion of the President "may be advantageously utilized for agricultural or grazing purposes." To hold that timbered lands may be allotted under this act is equivalent to saying: Timbered lands within an Indian reservation become, when surveyed, suitable for agriculture or grazing.

It becomes pertinent at this point to consider whether the treaty provisions respecting allotments have any force or effect, or whether the General Allotment Act supersedes them.

In terms section 1 of the allotment act covers this reservation, for the allotments therein provided for are of lands reserved for tribes or bands of Indians, "by treaty stipulation, act of Congress, or executive order."

There can be no dispute that the purpose of the act was to break up tribal relations, place the individual Indian upon his own resources in a limited way, secure his attachment to a particular tract of land as a home, thereby turning him to occupations which would cure him of his nomadic habits.

The act was broad and comprehensive and designed, as we view it, to inaugurate a new method of allotments in severalty superseding all prior enactments or treaties.

Specifically in this case, it superseded the treaty of July 1, 1855.

The view of the Interior Department in allotting reservation lands, since the allotment act became effective in 1887, has been that that act governed and superseded treaty provisions in this particular matter.

This construction, having been followed for so many years, is entitled to great respect and ought not to be overturned except for cogent reasons. *LaRoque* v. *United States*, 239 U. S. 62, 64; *Harris* v. *Bell*, 254 U. S. 103, 109; *McLaren* v. *Fleischer*, 256 U. S. 477, 481.

Again, that department has never considered the Omaha treaty provisions for allotments as practicable

or workable for this particular reservation, because the character of the two localities was vastly dissimilar, and the characteristics, habits, and mode of living of the Omahas were radically different from the Quileutes and the associated tribes.

That the Omaha treaty relative to allotments was unsuited to these Indians is clearly demonstrated by the fact that not a single allotment was made on this reservation until after the General Allotment Act was passed, more than thirty years after the treaty, and then when the allotments were made they were made pursuant to the provisions of that act.

But whether the General Allotment Act superseded in general treaty provisions for allotments, we contend that in respect to Tommy Payne, appellee here, any allotment made to him must be pursuant to the terms of that act.

We base this contention upon the Act of March 4, 1911, c. 246, 36 Stat. 1345, which is as follows:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute Tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for

> these tribes: *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

The reason for and purpose of this act are indicated by a letter of the Secretary of the Interior dated February 18, 1910, which was made a part of the report of the House Committee to which the bill was referred. It reads in part:

> By executive order of November 4, 1873, in pursuance of the treaty of July 1, 1855 (12 Stat. L. 971), there was set aside and reserved for the use of the Quinaielt, Quileute, Hoh, and other tribes of fish-eating Indians of Washington, approximately 220,000 acres of land.
>
> Article II of the treaty of 1855, supra, provided that it would be lawful for the members of the several tribes to reside upon any land not in the actual claim and possession of citizens of the United States for a period of one year pending their removal to the diminished reservation. The diminished reservation was not established until 1873, and a number of the Indians who had not removed thereto at that time continued to live on tracts outside of the reservation even after it was established.
>
> To protect these Indians in their holdings off the reservation, executive orders of February 19, 1889, and April 12 and September 11, 1893, set aside and reserved approximately 1 square mile each for the Quileute, Ozette, and

> Hoh tribes, respectively. These small reservations are and have been occupied by the Indians in the form of villages and do not contain enough lands to provide allotments for all the Indians thereon. Members of these tribes who moved to and resided continuously on the Quinaielt reservation were entitled to and received allotments there.
>
> The department is of the opinion, therefore, that those members of the Hoh, Ozette, and Quileute tribes who are residing on the separate reservations set aside for them should receive allotments on the Quinaielt reservation, and would be glad to see Senate bill 5269 enacted into law.
>
> House Rep. No. 2152, 61st Cong., 3rd sess.

Tommy Payne is one of the Indians thus legislated for as is shown by his testimony in this case, wherein he states (R. 34):

> That he is a full-blooded Indian of the Quileute tribe, born and raised on the Quileute reservation, and now fifty-five years of age. He has a family consisting of a wife and five children.
>
> That the Quileute reservation is about one mile square, and about two hundred Indians live on it.

Thus it will be seen that the treaty provisions become immaterial in the determination of this particular case, since this last act provides that allotments shall be made under the provisions of the allotments laws of the United States. We have, however, discussed the general effect of the allotment

act for the reason that the Interior Department has, as we have already pointed out, construed it as the sole guide in allotting reservation Indians and would welcome a decision of this court upon that point, so that the matter may be set at rest. In this connection we may say that other suits are pending of which this case may be determinative, if this broader question is decided.

II.

The discretion vested in the President by the applicable law was not exhausted by the survey of the lands within the reservation.

The courts below placed great stress upon the fact that the lands involved as well as other lands within this reservation had been surveyed. This was held to be a decision or finding by the President that the lands were subject to allotment because section 1 of the allotment act provides with respect to reservations that:

> The President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed *whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made* in such areas as in his opinion may be for their best interest. . . . (Italics supplied.)

It seems to us to be a strained construction of the statute to say that the order for survey or the survey itself constituted a final finding that *all* the land ordered to be surveyed was of the character specified as allottable.

Suppose three-fourths of the lands contained in an Indian reservation were agricultural or grazing in character, the other fourth timbered lands, and it was desired to allot the agricultural or grazing lands. Under the construction given the act by the lower courts, the executive would be compelled to limit the survey to three-fourths of the land and leave the one-fourth unsurveyed; if the timbered lands were in the center of the reservation the survey order must exclude them, otherwise they would become subject to allotment.

To say that a survey of a reservation must be made piecemeal or in fragments, and that no land may be surveyed without rendering it available for allotment even though it be not of a character specified in the act as susceptible of allotment, is to give the statute an absurd interpretation. Not only would such fragmentary surveys be unbusinesslike and at total variance with established methods of executing public land surveys, but the result would be confusing. Imagine a survey which would leave a township with the middle tiers of sections unsurveyed or one side of the township out.

Certainly the act did not contemplate that the order for survey would exhaust the power of the President or be a final decision that *all* the lands were of the character subject to allotment. The contrary construction in our judgment fails to give due weight to the words "and to cause allotment" which follow rather closely the language giving authority to survey. The authority is to "cause

. . . to be surveyed or resurveyed . . . *and* to cause allotment . . . to be made."

The survey is a necessary preliminary to allotment so that the lands may be definitely identified and located, and while it may well be said that the President's authority to cause surveys to be made is to be predicated upon a determination that the lands in a reservation, considered as a whole, are such as may be advantageously utilized for agricultural or grazing purposes, it does not follow that it is a finding that *all* the lands are allottable. Indeed, there would be practical difficulties in framing an order for a survey which would definitely describe the agricultural or grazing lands and eliminate the timbered lands. In most cases the order could be given only in general terms as for the survey of the agricultural or grazing lands. That would make the surveyor the judge of the character of the lands. Such an order could not in reason be held to be a determination as to what particular lands were agricultural or grazing, for they could not be definitely identified. That question would necessarily have to be decided after survey when the lands could be specifically described and segregated.

We are informed that, as a practical matter, surveys are made of Indian reservations in advance of a determination of the character of the lands. This action is justified by the Interior Department upon the ground that it is the expedient and sound procedure from the standpoint of good administration as well as warranted by the act, giving the

words "and to cause allotment to be made" equal force with the words "cause . . . to be surveyed."

But further, if as was held below an order for survey, or the survey of lands, exhausted the President's power with respect to a final determination of their character, then the executive is powerless to prevent allotments to qualified Indians, even though the order for survey was made improvidently or under a misapprehension of the true situation or as the result of misrepresentation.

Surely no such construction should be placed upon the act nor should the President's power be so limited. Compare *Kirk* v. *Olson*, 245 U. S. 225; *Johnson* v. *Payne*, 253 U. S. 209.

Reliance was placed upon the case of *United States* v. *Fairbanks*, 171 Fed. 337, and *Leecy* v. *United States*, 190 Fed. 289. These cases do not give support to the view taken below.

While the Circuit Court of Appeals in the *Fairbanks* case did cast doubt upon the power of the Secretary of the Interior to exclude timber lands from allotment (p. 340), yet the case was not decided upon that point for it became immaterial because subsequent legislation had made such land subject to allotment. When the case was considered by this court, *Fairbanks* v. *United States*, 223 U. S. 215, the question of the power of the Secretary in that respect was not passed upon, nor did the court say that it shared the doubt entertained by the Court of Appeals. It is important to note that in referring

to the power of the President under section 1 of the allotment act the Circuit Court of Appeals said (p. 339):

> The evidence in this case does not show the date of the order of the President directing that allotments be made under this statute. In our judgment, however, the making of one order did not exhaust the powers of the President. The statute vests a continuing power, and he could provide from time to time for allotments in favor of those born upon the reservation subsequent to the first order dealing with the subject, so long as there were lands of the reservation which had not been allotted. The statute submits the whole subject of the distribution of the lands embraced in the reservation, to the President, acting through the Interior Department.

Leecy v. *United States* was a case where the Secretary declined to allot a tract because it had been withdrawn as a sawmill reserve. The question presented was the power of the Secretary to make that withdrawal and it was held he did not have such power. The force of this decision is, however, much weakened by a later decision of the same court in *Gravelle* v. *United States*, 253 Fed. 549, which upheld the action of the Secretary in withdrawing from allotment lands which he deemed essential for an agency farm and pasture.

III.

The interests of the Quileute tribe as a whole are not to be subordinated to the interest or claim of an individual member.

The question presented under this point is the relative rights of the tribe and the individual member of it.

In declining to allot this land to Payne, the Interior Department is not proceeding in an arbitrary manner disregarding the rights or welfare of Payne, or discriminating against him. On the contrary, the Secretary of the Interior has in view the welfare of the tribe. The Secretary is proposing and has been negotiating a sale of all the timber on the unallotted lands. The proceeds of the sale will be distributed among the members of the tribe. Payne will receive his just share of that and then doubtless can also have an allotment of land. So it is clear that this is not a case of denying Payne an allotment of land and then giving it to some one else.

The Secretary in his administration of Indian affairs is not confined to a consideration of the welfare of the individual Indian alone—he is of course concerned about that—but he should and it is his duty to consider the welfare and interest of the Indians as a tribe. He is doing so in the instant case.

The District Court seemed to have gained an impression that discrimination was being practiced, for its opinion on the merits concludes (R. 17):

> No explanation is given of why allotments should have been made to the Quinaielt Indians, under substantially the same conditions, and allotments refused the plaintiff and other Quileutes.

Now the fact is that the official records of the Interior Department show that members of both tribes have received allotments on this reservation; that scores of allotment selections made by members of the Quinaielt tribe have been rejected for the same reason that Payne's application was denied.

When allotting operations were started on the reservation some fifteen years ago, the instructions to the allotting agent were to allot lands that could be used for agricultural or grazing purposes, and every allotment that has been approved received approval upon the assumption that it embraced land of that character.

After nearly seven hundred allotments had been approved it was discovered that some allotments were for lands chiefly valuable for timber. In consequence the allotment work was stopped and no allotments on this reservation have been approved since October 27, 1910, for the reason that practically all remaining unallotted lands have been regarded as timber lands.

Furthermore, if Payne should secure this allotment containing timber of the value of $3,900, he would gain an advantage over others who have secured only agricultural land or land containing but a small amount of timber. So that the equities are not all

on his side. The Secretary is seeking to make such disposition of the timber as will result in benefit to all the tribe and not to the few who may secure these timbered lands.

The District Court seems to have had the impression that the Indian was being unjustly dealt with. This is indicated by the statement (R. 16) that "in exchange for a vast and rich heritage of lands released by the Indians, the government reserved for them a small parcel of land in a remote wilderness."

The Court of Appeals seemed to have been impressed likewise, for in justification of its conclusion it said (R. 60):

> The construction outlined seems specially fair in the case of the Quileute Indians, who gave up a large area under assurances that they would have a reservation in the heavily-timbered wilderness selected by them and the other makers of the treaty.

While not particularly important, we think in the interest of accuracy attention should be drawn to the fact that under Article IV of the Treaty the Indians were to be paid $25,000 for the cession of their lands. This was additional to a reservation of other lands as provided in Article II to be set aside for them. It was not, as the courts below seemed to have thought, a bare exchange of land for land. Further, the United States agreed to pay $2,500 to enable the Indians to remove to the new reservation and to clear, fence, and break the land (Article V);

it agreed to support for twenty years an agricultural and industrial school to be open to the children of these tribes; also to furnish medical attendance (Article X).

CONCLUSION.

The judgment of the Circuit Court of Appeals was erroneous and should be reversed.

JAMES M. BECK,
Solicitor General.

H. L. UNDERWOOD,
Special Assistant to the Attorney General.

FEBRUARY, 1924.

O

No. 360

In the

Supreme Court of the United States

October Term, 1923

THE UNITED STATES OF AMERICA,
Appellant,

v.

TOMMY PAYNE,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

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No. 240

In the

Supreme Court of the United States

OCTOBER TERM, 1923

THE UNITED STATES OF AMERICA,
Appellant,

v.

TOMMY PAYNE, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

Brief of Tommy Payne

The sole question at issue is whether appellee Tommy Payne, a full blood Quileute Indian, is entitled to an allotment land of eighty acres heretofore selected by him upon the Quinault Indian reservation which reservation was selected and set

apart for the "sole and exclusive use" of the Quileute and Quinaielt tribes of Indians. Appellant's officers attempt to justify their action in excluding appellee from the land selected by him upon a reservation set apart for his and a neighboring tribe solely upon the ground that the land selected is now more valuable for timber growing upon it than for agricultural or grazing purposes.

(Italics and capitals herein are ours.)

The treaty between the Quileute and Quinaielt Indians with the United States in July, 1895, and January, 1896 (12 Stat. 971), provides in part as follows: "There shall however be reserved for the use and occupation of the tribes and bands aforesaid a tract *or tracts* of land sufficient for their wants within the Territory of Washington *to be selected by the President* of the United States and hereafter surveyed or located *and set apart for their exclusive use.*" Art. 5 provides in part as follows: "To enable the said Indians to remove to and settle upon such reservations *as may be selected* for them by the President and to *clear*, fence and break up a sufficient quantity of land for cultivation, the United States further agrees to pay the sum of two thousand five hundred $2,500) dollars." Art. 6 provides in part, "And he (the President) may further at his discretion cause the whole or any portion of the lands to be

reserved, or such other land as may be selected in lieu thereof to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same *as a permanent home* on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable."

The sixth article of the Omaha treaty referred to (10 Stat. 1043) provides for allotments in severalty to a single person over twenty-one years of age, eighty acres; to each family of two, one hundred and sixty acres; to a family of six, one section, etc."

In addition to the treaty stipulations Congress passed the general alloting acts, with amendments as set out in appellant's brief, and in addition thereto on March 4, 1911, passed the special act directing that these Indians be given allotments on this particular reservation (Stat. 36-1345). This special statute which superceded other acts if any inconsistent with it, provides:

"That the Secretary of the Interior be and he hereby is authorized and *directed* to make allotments on the Quinaielt reservation, Washington, under the provisions of the allotment law of the United States to *all* members of the Hoh, Quileute,

Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation, rather than on the reservations set aside for these tribes; provided, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt reservation after the allotments to the Indians thereon have been completed."

The letter of the Secretary set forth in appellant's brief, although outside the record, is not objected to by appellee, who requests that it be considered. It shows the conditions existing at the time the bill was pending and shows conclusively that the Secretary then considered that the Quileute Indians who had moved to, and resided upon the one mile reservations were entitled to allotments on the large reservation of two hundred and twenty thousand acres.

Appellee is one of the two hundred Quileute Indians residing on a one mile square reservation at La Push, near the mouth of the Quileute river. (R. 34.)

Appellee contends:

a. That he is entitled to the land selected by him regardless of what may be its value or character.

b. That he is entitled to it regardless of relative value for agriculture and timber.

c. That the undisputed evidence is that all or a large portion of it is agricultural land.

d. That two courts have passed upon the facts, adjudged them adversely to appellant and this court will not therefore re-examine the facts.

In an equity case where it is sought by a guardian to deprive its ward of the right to an allotment of land upon a reservation reserved for the "exclusive use" of his tribe, it would be expected that some cogent reason would be presented to justfiy such action or that some or many legal justifications would be presented. This should be true when the policy of the government for many years has been to encourage the Indians to abandon tribal relations to take up agricultural pursuits and to build homes for themselves and their families.

Appellant's brief advances no equity, why appellee is not entitled to the land, neither does it cite any authority in law to support its most unusual action in excluding appellee from land lawfully selected, by him in the usual manner; land to which appellant and no person asserts or has ever asserted any adverse claim.

APPELLEE IS ENTITLED TO THE LAND REGARDLESS OF CHARACTER OR VALUE

1st. Because of treaty stipulations.

2nd. Under the general laws providing for allotments to Indians.

3rd. By virtue of the special Act of Mar. 4, 1911, directing the allotment to be made.

The President exercised his discretion to have the lands surveyed and allotted and a special alloting agent, Frank Archer, was sent to this reservation to make the allotments. (R. 34.)

The record does not show just when this occurred but it was probably shortly after the special act was passed *directing* that these Indians be allotted.

Appellee selected the land with the aid of Mr. Archer's assistant. "They showed plaintiff maps and locations of where there was good lands for agricultural purposes; that is how he got this." (R. 34.) Having selected the land in the usual and lawful manner from the alloting agent specially appointed by the United States for the purpose and having his selection properly noted (R. 34, 35), he has done everything necessary or required and is

entitled to the allotment from the date of its selection regardless of its character or value.

The decision of the Circuit Court of Appeals in *Leecy v. U. S.*, 190 Fed. 289, is on all fours with this case. The appeal of that case was dismissed upon motion of the Attorney General in the supreme court, 232 U. S. 732, 58 L. Ed. 818. In that case a section of land, part of the Mille Lac Indian reservation, was withdrawn by order of the Secretary of the Interior from allotment in order that the timber upon it could be cut, the lumber to be used to build houses for the Indians. Thereafter Mrs. Leecy selected a part of the land so withdrawn for an aditional allotment. The circuit court decided the Secretary's action in withdrawing the land until the timber could be removed was without authority of law and invalid. At page 292 the court says:

"Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which ongress had authorized to be so

distributed. The law was to be executed under, not nullified by, rules and regulations. The power to withdraw the land in question cannot be found in the provision that allotments should be certified by the Secretary of the Interior for his action in the one providing for his approval of allotments before patent."

Referring to the Act under which that and this suit are brought, the court says (p. 293):

"It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that as allotments must be reported to the Secretary of the Interior for his approval the absence of his approval would defeat the suit, when of course no one would want to bring a suit if he had that approval. * * * A strong argument is made tending to show that power should be vested in the President or some other officer of the Government to withhold from allotment lands specially needed for the use of the trible as a whole, but such argument should be addressed to Congress rather than to the courts. If such a law would be wise that is no reason why an executive department should make one, or the courts sustain it in doing so."

"It is true that the Secretary of the Interior may prescribe reasonable rules and regulations not inconsistent with or contrary to the law of Congress

under which allotments shall be made; but this does not authorize him to withhold an allotment altogether from one shown by the rolls to be entitled thereo. Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267; Quinn v. Chapman, 111 U. S. 445, 28 L. Ed. 476; United States v. Symonds, 120 U. S. 46, 30 L. Ed. 557; Hartman v. Warren, 76 Fed. 157; Leecy v. U. S., 190 Fed. 289. The enrollment within the time required and as of the date fixed determines the right of the citizen to an allotment *and the failure beyond a reasonable time* after its approval by the Secretary of the Interior to make the allotment and issue the proper evidence thereof can not operate to deprive him of the right thereto."

Henry Gas. Co. v. United States, 191 Fed. 132.

In *St. Louis Ind. Pack. Co. v. Houston*, 215 Fed. 559, the *Leecy* case is cited with approval. The court says:

"It is within the power of Congress to vest in executive officers the power to promulgate administrative rules, but this never is deemed to extend to the making of rules to subvert the statute."

See:

Ballinger v. U. S., 216 U. S. 240, 54 L. Ed. 464.

Wood v. Gleason, 140 Pac. 418.

Garfield v. Goldsby, 211 U. S. 249, 53 L. Ed. 168.

In the case of *United States v. Paine Lumber Co.*, 206 U. S. 467, 51 L. Ed. 1139, the decision of the Circuit Court which hold the Munsee Indians had the right to cut and sell timber from allotments for which no patents had been issued, was affirmed.

From the adjudicated cases it would seem the refusal to allot land upon which merchantable timber is growing is an attempted innovation, wholly without law or precedent. Appellant's brief fails to point out, and appellee does not know why or under what authority he is excluded for years from lands sorely needed for a home.

In *Bonnifer v. Smith*, 166 Fed. 846, it was held rights to an allotment dated from the time selection is made. In the same case in the lower court, 154 Fed. 883, it was held that all the Indians are entitled to participate in allotments.

See, also, *Oaks v. U. S.*, 172 Fed. 305.

The lands embraced in this reservation were not designated in the treaty but were provided for. The tract was designated later and set apart by an executive order. The Indians presumably had nothing to say or do in selecting it. It would seem this is a proper case to apply the rule of estoppel, that a guardian having made a selection of land for its

wards for their homes, is estopped in equity from asserting that the very land it selected for them and their use is not suitable for the purpose for which appellant selected it.

Appellee has found no decision which in any way tends to support appellant's contention that the Secretary of the Interior can upon any pretext exclude an Indian from an allotment of lands selected in the usual way upon a reservation set apart for his tribe surveyed and opened for allotment. Appellant has cited none. The case of *Gravelle v. United States*, 253 Fed. 549, is not in point as the land claimed in that case had previously been reserved for school and agency purposes for the benefit of the tribe.

The treaty, general allotting laws and special act contain no clause of limitation, as to the existence or value of land or timber, and no such limitation should be read into them. The special act, which being the latest and applying to this reservation only, must be held to control, and it makes no reference whatever to agricultural or grazing land, but directs the allotments to be made of land pracically all of which is now more valuable for timber than for agriculture. (R. 42.)

The treaty (12 Stat. 971), article 5, provides:

"To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to *clear*, fence and break up a sufficient quantity of land for cultivation, the United States agrees further to pay the sum of two thousand five hundred dollars to be laid out and expended under direction of the President. * *"

This is a clear recognition that the land was timbered to some extent at least, and must, to be available for cultivation, be cleared. Note the word "*clear*" is used before "fence" and "break up." Note also it was clearly intended the Indians were to "*remove to* and *settle upon*" the reservation. Instead of paying money to help the Indians "remove to and settle upon" and "to clear" a quantity of the land, they have, as admitted by the answer filed, been excluded from the land by appellant (R. 36), and prohibited from being permitted to themselves clear a quantity "sufficient for cultivation."

The court will take judicial notice that the portion of Washington lying west of the summit of the Cascade Mountains is noted as being heavily timbered, and that this reservation borders on the Pacific in that district. See, also, statement of agent at Tahola on the reservation (R. 42): "Very few allotments (already made) on this reservation on

which the timber is not greated in excess of any value that can be accredited to the land."

THE UNDISPUTED EVIDENCE IS THAT THE LAND IS VALUABLE FOR AGRICULTURAL AND GRAZING PURPOSES

Appellee after testifying that his father Tah-ah-ha-whtl, was one of the Quilleutes who signed the treaty (R. 34), testified through an interpreter (R. 34): "The selection was made through Mr. Archer, at that time alloting agent of the Government. Mr. Archer instructed his assistant to go and see the plaintiff, together with the rest of the people that were entitled to allotments at the time, and *they showed the plaintiff maps and locations of where there was good lands for agricultural purposes;* that is how he got this." (R. 35.) "About one-half of the land is heavily timbered with cedar and hemlock and the remainder, bottom land, with clay soil. The character of the land is very similar to all the lands along the Raft and Queets River, which is mostly bottom land, clay soil. Part of the land is open along the bottom. That if the timber were removed it would make good agricultural land." (R. 36.) "That plaintiff feels sure he can support his family if given the right to that land;

that both white people and Indians along the Queets River are making a good living today out of their farms along the river, and the Queets River is about six miles from the land plaintiff selected."

Appellee further testified (R. 36), that he was seeking the allotment for himself to hold permanently; that he had (R. 34) a wife and five small children to support. * * * (R. 35.) "That it is necessary now that the Indians should have agricultural lands in order to support their families on account of their fish getting played out, and the seal hunting getting very poor and all other things along the river where they used to make their living has got so that they are restricted from getting the fish and making their living, which is why it is necessary for them to all move over on their allotment. * * * * That plaintiff has supported his family on fishing and seal hunting but those things are played out, and in a few years they do not know what they are going to do. That the Indians used to hunt sea otter years ago but that is all gone. These big purse seine companies have gotten so thick now that the Indians' fish * * * are pretty nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation.

Joe Pullen, a Quileute Indian, testified (R. 37): "The locality where Tommy Payne has made his selection was partly bottom land and fit for agricultural purposes in some places, but a little further in it is kind of heavy timber, pretty hard to clear, but not what you would call timber land. * * * * That the soil is clay soil and the portion where it is most heavily timbered would be good for grazing or agriculture with the timber removed. That the land is not all bottom land but brush land. * * * Part of the land is as brushy, about one-third of the tract as fit for agriculture, and the timbered area as containing some merchantable timber."

Jack Ward, another Quileute Indian, testified (R. 38): "That the land is the same as around the Queets country, where the farmers live; that he would say pretty near one-half of the selection was good for agricultural land and the other half toward the hill is timber and if the timber were removed would be about the right kind of land for agriculture and grazing. That he should judge about 30 acres of this selection is open like, brushy, and the other fifty is where the timber lies. * * * On the Queets River there are about eight Indian families and right across the river there are over twenty white families. That one farmer living

right across from the Indian farms (R. 39), has about 40 head of cattle and has cleared about 60 acres of his ranch, and the land in the Raft River territory, including the land Mr. Payne selected, *is as good* and *of the same character.*"

Appellant's evidence (R. 40), is that "about 30 acres of the land consists of *fairly rich bottom which if cleared makes good farm land.* The balance (50 acres) consists of rolly bench and hill slope to the higher land back from the river, and would, if cleared, *make grazing* and *possibly* farm land."

Appellee contends that there is no dispute as to the evidence, which is conclusive that about 30 acres, a tract in itself amply sufficient for immediate needs, is good bottom land covered with brush, easily cleared, and the remainder land which when cleared will be valuable for grazing and pasture at least, and possibly farming as well. This being true, what matters it that a portion is more valuable for timber. So would be all of the lands of western Washington which once had a fair amount of timber, if the timber had been permitted to stand until now, but it was cut down and made into lumber and the land now supports nearly three-fourths of a million inhabitants.

When was it ever decided that an executive officer could disregard treaty stipulations, rights conferred by general statutes, and express directions of a special statute, under any similar facts?

The Secretary is excluding appellee from substantial rights, disregarding a direction to allot, refusing to act and perform his duty, under a pretext of performing a duty.

TWO COURTS HAVE PASSED UPON THE FACTS WHICH AS TO THE CHARACTER OF THE LAND ARE UNDISPUTED, AND THIS COURT WILL NOT REEXAMINE THE FACTS WHICH ARE DECISIVE, BUT WILL AFFIRM THE DECREE

Palmerlee vs. Chicago, Milwaukee & St. Paul Ry., 246 U. S. 659.

Chicago Junction Ry. Co. v. King, 222 U. S. 222, 56 L. Ed. 173.

Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 60 L. Ed. 745.

Baltimore & Ohio Ry. Co. v. Whitacre, 242 U. S. 169, 61 L. Ed. 228.

The late General Hazard Stevens, who was secretary for his father, Isaac I. Stevens, at the making of the treaties with the Indians of Washington Territory, in his history of his father, at page 463, quotes Governor Stevens' promises to the Indians when one of the treaties was made, as follows:

"We want to place you in homes where you can cultivate the soil, raising potatoes and other articles of food, and where you may be able to pass in canoes over the waters of the Sound. * * * The Great Father desires this, and this is why I am able to say this, the Great Father thinks you ought to have homes and he wants you to have a school. Those white children have always told you you would be paid for your lands, and we are here now to buy them."

At the Point No Point treaty he told them, volume 1, page 469: "The Great Father wants you and the Whites to be friends; he wants you to have a houes of your own, to have a school where your children can learn. He wants you to learn to farm, to learn to use tools, * * *. This you will have all the time, and *when the paper comes from the Great Father, then you will have your own* houses and homes and schools."

At page 472: "The Governor addressed them, pointing out *that the treaty gave them all those things* that a father would give his children, as homes, schools, medicines and a doctor."

At the Medicine Creek Treaty (page 458), Governor Stevens told them: "You will have certain lands set apart for your homes."

It is reasonable to suppose the same or similar promises were made to the Quileutes at the time their treaty was negotiated. The treaty was interpreted to these Indians in Chinook jargon, a very imperfect means of communicating any but the most simple transactions and thoughts.

In the case of *Seufert Bros. Co. v. U. S.*, 249 U. S. 194, 63 L. Ed. 555, the Supreme Court quoted with approval from *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, as follows:

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, 'and counterpoise the inequality' by the superior justice which looks only to substance of the right without regard to technical rules. Choctaw Nation v. U. S., 119 U. S. 1, 30 L. Ed. 306; Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49."

Referring to the Kansas Indians, 72 U. S. 737, 18 L. Ed. 667, the Supreme Court said:

"If they have outlived many things they have not outlived the protection afforded by the Constitution, treaties and laws of Congress."

Viewing the sixth article of the treaty with this light of this reliable history there can be no doubt

that the Indians understood the word "may" as "will," in the sixth article, and that it was a positive promise that lands *would* be assigned them sufficient for their homes and needs.

It is pertinent to ask why was an provision made in the treaty or statute for allotments at all, if the reservation selected was all timbered and timber land was not to be allotted.

It would seem this is a proper case to apply the rule announced in *Choctaw Nation v. U. S., supra*, and to "counterpoise the inequality by the superior justice which looks only to substance and the right, without regard to technical rules."

Appellant's arguments in regard to the exercise of discretion by the President as to the character of land to be allotted is met by the fact that the treaty dealt with timbered lands. The President by executive order selected this reservation of timber lands. Practically all other allotments of lands made to the Quinaielts is the same character (R. 42), while a great majority of the Quileutes, having equal rights, joined in the same treaty, have been refused allotments. (R. 39.) And, lastly, the President's representatives pointed out to appellee and his people the maps and locations which were suitable for agricultural purposes. (R. 34.)

The late President Roosevelt would have heartily enjoyed crossing the wilds of this reservation, as the writer has done. It cannot be expected of a President, and the President acted by and through his allotting agent, Frank Archer, and his assistant, as effectually as though done in person. The Secretary is bound by such acts officially done in the line of their duties.

Our first territorial governor, who negotiated this treay, was killed in the battle of Chantilly in the War of the Rebellion. His promises solemnly made to and relied upon by these people have not been kept. They relinquished millions of acres of the same character of land, practically all of which was heavily timbered, relying upon the faith of a solemn treaty. For sixty-eight years these hardy people have watched the tides of the Pacific and the years come and go, but the Great ather at Washington has been unmindful of the promises of the dead governor killed in action while honorably serving his country at the head of his troops.

When suit is finally brought by one of these people in a court of equity to obtain his rights, a wholly illegal, unjust makeshift of a defense is interposed.

The approval of this court should be added to the decree of the trial and appellate courts awarding appellee justice long delayed.

Respectfully submitted,

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